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IN THE

Supreme Court of the United States

OCTOBER TERM 1964

No. 149

IN THE MATTER OF THE ADOPTION OF MOLLY PAGE ARMSTRONG, A MINOR

R. WRIGHT ARMSTRONG, JR.,

Petitioner,

VERSUS

SALVATORE E. MANZO, et ux.,

Respondents.

Respondents' Brief on the Merits

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Salvatore E. Manzo and wife, Alice Flournoy Davis Manzo, Respondents, respectfully urge that the relief prayed by petitioner regarding the holding of the Court of Civil Appeals for the Eighth Supreme Judicial District of Texas be denied.

Petitioner Was Given a Full Hearing on the Question of the Adoption.

On the day the original decree was entered in the Trial Court, April 27, 1962, Respondent Salvatore E. Manzo wrote Petitioner's father that the adoption had been decreed (Record, page 43, letter, exhibit R-2). Petitioner was residing with his father at the time (Record, depositions of Petitioner, p. 146, and of his father, p. 176). Thereafter, on May 7, 1962, Petitioner's original motion for new trial was filed. On May 25, 1962 Petitioner filed his "Amended Motion for New Trial and Motion to Vacate Judgment". The Trial Court set a hearing for June 14, 1962. On Petitioner's application for continuance, the hearing was re-set for June 22, 1962. The parties, by stipulation of counsel, took oral depositions of four witnesses in Ft. Worth, Texas, being the depositions of Mr. Irby and Dr. Kelly on June 14, 1962, and of Petitioner and Petitioner's father on June 16, 1962.

On June 22, 1962, the hearing was held, and Petitioner introduced testimony from five witnesses, introduced exhibits, and offered testimony from the four depositions which had been taken.

On June 29, 1962 the Trial Court confirmed the decree of adoption, and Petitioner gave his notice of appeal. On July 10, 1962 Petitioner filed his request for findings of fact and conclusions of law, and on July 16, 1962 the Trial Court filed such findings and conclusions.

Thus, from the foregoing, and the testimony in the Record, pages 16 to 184, it is apparent that Petitioner was accorded a full hearing on the adoption. Further, Petitioner was given ample time to take depositions in

Ft. Worth, attended by the attorney who tried the case for Petitioner in the Trial Court and the Texas appellate courts; to continue the hearing to a later date; and to bring witnesses to El Paso from Ft. Worth (Father Leatherbury, Record, p. 37; Mr. Armstrong, Sr., p. 40), a distance of more than five hundred miles. Petitioner made no complaint that other testimony was available to him or that more time was needed, and Petitioner proceeded with the putting on of testimony without complaint that he assumed the burden of proceeding (Record p. 16). Petitioner closed without complaint that time had been inadequate for the presentation of his case (Record p. 108 and p. 110). Petitioner enjoyed due process of law and procedure for his opportunity to present his case to the Trial Court and the Texas appellate courts, and suffered no denial of Constitutional protection.

The Texas Adoption Statutes, as Interpreted by the Texas Courts, Require a Full Hearing for the Parent.

The Supreme Court of the United States accepts the construction placed by the state court on the state statute under consideration. *Morehead* v. *New York,* 298 U.S. 587 (1936).

The state court rulings in Texas have held that the parent's consent to adoption is not required where there has been a failure to support, under Article 46a, Revised Civil Statutes of Texas, but that the parent must be allowed a full hearing in subsequent proceedings on the issue of whether sufficient facts existed as to authorize the entry of the judgment of adoption. *Lee v. Purvin,* 285 S. W. 2 405, 410 (Tex. Civ. App., 1955, writ of error refused, no reversible error); *Johnston v. Chapman,*

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279 S.W. 2 597, 599 (Tex. Civ. App., 1955, writ ref., n.r.e.); *Pettit* v. *Engelking*, 260 S.W. 2 613, (Tex. Civ. App., 1953, writ ref., n.r.e.). A judgment of adoption is not final as to the parent until such hearing is held, nor does statutory limitation apply as to the right to have such a hearing. *Johnston* v. *Chapman*, page 599.

Here, Petitioner was granted his full hearing, not in a "subsequent proceeding" but in the same proceeding, and the holding on the appeal was in the line of Texas authority cited above. Express reliance was made by the Court of Civil Appeals on *Lee* v. *Purvin*, and the effect of the holding by the Court of Civil Appeals is that Petitioner's consent was not necessary for the adoption since there had been a failure to support, but Petitioner had been given a full hearing on the subject. *In re Adoption of Armstrong*, 371 S.W. 2 407, 412 (Tex. Civ. App., 1963, writ ref., n.r.e.)

The procedure in Texas, therefore, allows the parent a full hearing, and Petitioner was allowed a full hearing in the same proceeding in which the adoption was decreed.

The Texas Statute is Constitutional.

The Texas statute, Article 46a, allows adoption without *consent* of the parent in cases of non-support or abandonment. However, the statute does not attempt specifically to dispense with the necessity of *notice* to the parent, and Texas cases have never taken the position that an adoption would be valid without notice to the parent or an opportunity to be heard. On the contrary, the Texas cases cited above hold that the adoption is

not effective as to the parent unless the parent is given a hearing. A recent case arising under the statute in question, involving a question of abandonment, *Gunn* v. *Cavanaugh,* 385 S.W.2 451 (Tex. Civ. App., 1965), holds as follows (page 452):

"In dismissing this appeal we have gone into some detail in reviewing the proceedings and the order allowing the children to be adopted may not be binding on the father since he was not a party thereto and did not give his consent to the adoption. Jones v. Willson, Tex. Civ. App., 285 S.W.2d 877; DeWitt v. Brooks, 143 Tex. 122, 182 S.W. 2d 687; Strode v. Silverman, 209 S.W.2d 415, Waco C.C.A., writ ref., n. r. e.".

Thus, the statute in question dispenses with consent, but the Texas procedure requires that the parent be made a party or be given a full hearing. Otherwise, the adoption is not effective as to the parent.

CONCLUSION

The statute itself is not unconstitutional, and, since Petitioner appeared and was given a full hearing on the question of non-support, this particular adoption is valid as to Petitioner.

Respectfully submitted,

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This is to certify that on the 27 day of Feb. 1965 a true copy of the foregoing brief was served upon counsel for Petitioner by depositing copies thereof in the United States mail, certified return receipt requested, addressed to Mr. Ewell Lee Smith, Jr., 1100 Adolphus Tower, Dallas, Texas.

W Duncan

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